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In the

Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, SHERIFF/CORONER,
RAVALLI COUNTY, MONTANA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

SHERIFF RICHARD MACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writs Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE STATES OF MARYLAND, CONNECTICUT, FLORIDA, HAWAII, IOWA, MICHIGAN, MINNESOTA, MISSISSIPPI, NEVADA, NORTH CAROLINA, OREGON, RHODE ISLAND, AND WISCONSIN *AMICI CURIAE* IN SUPPORT OF RESPONDENT

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA*
JOHN B. HOWARD, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7055
Counsel for *Amici* States

RICHARD ADAMS CORDRAY
4900 Grove City Road
Grove City, Ohio 43123

Of Counsel

**Counsel of Record*
[additional counsel listed on inside cover]

26 pp

RICHARD BLUMENTHAL
Attorney General of Connecticut
55 Elm Street
Hartford, CT 06141-0120

ROBERT A. BUTTERWORTH
Attorney General of Florida
The Capitol
PL 01
Tallahassee, FL 32399-1050

MARGERY S. BRONSTER
Attorney General of Hawaii
425 Queen Street
Honolulu, HI 96813

THOMAS J. MILLER
Attorney General of Iowa
Hoover Building
Des Moines, IA 50319

FRANK J. KELLEY
Attorney General of Michigan
Post Office Box 30212
525 West Ottawa Street
Lansing, MI 48909-0212

HUBERT H. HUMPHREY, III
Attorney General of Minnesota
State Capitol - Suite 102
St. Paul, MN 55155

MIKE MOORE
Attorney General of Mississippi
Department of Justice
Post Office Box 220
Jackson, MS 39205-0220

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Capitol Complex
Carson City, NV 89710

MICHAEL F. EASLEY
Attorney General North Carolina
Department of Justice
Post Office Box 629
Raleigh, NC 27602-0629

THEODORE R. KULONGOSKI
Attorney General of Oregon
100 Justice Building
Salena, Oregon 97310

JEFFREY B. PINE
Attorney General of Rhode Island
150 South Main Street
Providence, RI 02903

JAMES E. DOYLE
Attorney General of Wisconsin
State Capitol - Suite 114 East
Post Office Box 7857
Madison, WI 53707-7857

QUESTION PRESENTED

Does the Brady Handgun Violence Prevention Act, which temporarily requires state and local law enforcement officers to make a "reasonable effort" to ascertain the legality of proposed handgun transfers, transgress the Tenth Amendment by "commandeering" sovereign state authority?

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Pursuant to Sup. Ct. R. 37, the signatory States respectfully submit this brief as *amici curiae* in support of respondent.

STATEMENT OF INTEREST OF THE AMICI CURIAE

The amici curiae States share an interest both in preserving a vigorous interpretation of the Tenth Amendment and in continuing the tradition of cooperation between the state and federal governments in important law enforcement missions, such as deterring violent crime by keeping handguns out of the hands of those likely to commit crimes. The amici States support the validity of the interim provisions of the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993) (the "Brady Act"), because they are no different in kind from the type of joint state-federal law enforcement efforts that occur routinely in many contexts. For example, the States benefit from having access to computer information made available to state and local law enforcement officials nationwide by the National Crime Information Center. It is not at all surprising or paradoxical, then, that the amici States support the power of the federal government to devise a national approach to the ravages of handgun-related violence. Indeed, in the view of the amici States, this and other important law enforcement objectives would be undermined by an interpretation of the Tenth Amendment that balkanized law enforcement efforts by erecting an inflexible barrier to approaches that require some cooperation between the state and federal governments .

The amici States also have a strong interest in emphasizing that their support of the constitutionality of the challenged provisions of the Brady Act is grounded on an understanding that the provisions represent a minimal and temporary request for ministerial assistance from the States. Properly interpreted, these provisions afford state and local law enforcement officials substantial discretion in deciding how to carry out the required background checks in a way that does not interfere with or compromise state autonomy

in addressing law enforcement responsibilities.

SUMMARY OF ARGUMENT

The challenged provisions of the Brady Act continue the extremely valuable and constitutionally sound tradition of "cooperative federalism" in the law enforcement arena, a tradition originating contemporaneously with the establishment of our federal system. The First Congress, which framed the proposal ultimately ratified as the Tenth Amendment, also enacted a number of federal laws expressly requiring the reasonable assistance of state officials for their execution. By long practice, the compiling, storing, checking, and sharing of information for purposes of criminal law enforcement, as required by the Brady Act, are core areas of state-federal cooperation, as exemplified in the federal law that established a national crime information center. In fact, the challenged provisions of the Brady Act are transitional steps toward the development of a national system for instant criminal background checks, which is mandated to occur by 1998 and which will benefit all States. Viewed in their proper context, the challenged provisions of the Brady Act represent an entirely appropriate and constitutional interim approach to the daunting law enforcement challenge of containing the nationwide proliferation of handgun-related violence. This Court should not, and it need not, construe these provisions so broadly as to create hypothetical Tenth Amendment concerns.

The minimal interim role given to state and local law enforcement officers in implementing this system is considerably more respectful of state sovereignty than the federal obligations that this Court approved against a Tenth Amendment challenge in *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed. 532 (1982), as is evident

from an analysis of Justice O'Connor's partial dissent in that case. The Brady Act scheme is also consistent with this Court's decision in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992), because, unlike the statute in *New York*, the Brady Act does not regulate "States as States" and does not coerce state compliance. Properly interpreted, the Brady Act merely asks law enforcement officers, whose duty it is to apply and enforce controlling law, to make a reasonable effort, consistent with their own determination of law enforcement priorities, to ascertain whether a prospective handgun purchaser poses a threat to the community. In marked contrast to the statute at issue in *New York*, the interim provisions do not require legislative action by a State, but merely request that executive officers--law enforcement officials--undertake an activity that is similar to many performed in the normal course of their duties.

ARGUMENT

I. THE BRADY ACT CONTEMPLATES A MINIMAL INTERIM ROLE FOR STATE OFFICIALS

The challenged provisions of the Brady Act impose a minimal burden on the States. The requirements that state and local chief law enforcement officers ("CLEOs") conduct background checks on prospective handgun purchasers will expire on or before November 30, 1998, when the national instant background check system provided in the Act will be implemented, allowing for firearms sellers to perform the checks at the point of sale. According to the Open Letter to State and Local Law Enforcement Officials from the Bureau of Alcohol, Tobacco and Firearms dated January 21, 1994, Excerpts of Record on Appeal at 28, reproduced at Appendix to Brief for the United States, *Printz v. United States*, No. 95-1478, at 17a,

the Brady Act "anticipates *some minimal effort* to check commonly available records. It is not realistic to expect the CLEO to have available, or check, every conceivable record system that may contain information relating to categories of prohibited persons." (emphasis added). As construed by the Bureau of Alcohol, Tobacco and Firearms ("ATF"), the agency charged with interpreting and implementing the Gun Control Act, 18 U.S.C. § 926, the challenged provisions of the Brady Act are not coercive in the least. *Cf. United States v. Rutherford*, 442 U.S. 544, 99 S.Ct. 2470, 61 L.Ed. 2d 68 (1979) (construction of statute by agency charged with its administration is entitled to substantial deference). For example, the ATF recognizes that "[t]he level of research may justifiably vary among law enforcement agencies," each of which would "set its own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." If the CLEO mistakenly informs a federal firearm licensee that a prospective purchaser is prohibited from purchasing a handgun, the Brady Act provides that the CLEO shall not be liable for preventing the sale. Most checks can be accomplished through use of the National Crime Information Center (the "NCIC"), which the Attorney General has designated as "the national system to be used by law enforcement for crime history record background checks under the interim provisions of the Brady Handgun Violence Prevention Act." 59 Fed. Reg. 9498 (Feb. 24, 1994).

Moreover, Congress has provided substantial benefits through the Brady Act to fund state law enforcement activities. The Act authorizes $200 million in grants to States to create "a computerized criminal history record system" or to improve existing systems, as well as funds to

assist States in transmitting information to the national system once it is online. This funding supplements $850 million in federal funding for improvement of state criminal history records and other law enforcement purposes through the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690.

In view of the ATF's narrow interpretation of the requirements of the Brady Act and the federal assistance to States to facilitate criminal history information systems, the Brady Act's requirement of "reasonable effort to ascertain" the legality of a handgun transfer constitutes at most a very slight burden on the States.[1] This interpretation is faithful to the statutory language and avoids Tenth Amendment issues that might arise if the provisions were read as imposing truly burdensome obligations on State officials. *See New York v. United States*, 505 U.S. 144, 170, 112 S.Ct. 2408, 2425, 120 L.Ed. 2d 120, 146 (1992) (noting that, when parties urge two conflicting views of federal requirements imposed on States, and one "construction of [the] statute would raise serious constitutional problems, the

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[1] The burden is also diminished by the fact that the interim provisions do not apply in the 28 States (including Maryland) and two territories that have background check or permit requirements. *See* 18 U.S.C. 922(s)(1)(C)-(D); *see also* Md. Art. 27 § 442; Code of Maryland Regulations 29.03.01.08 (requiring seven-day waiting period and background check before transfer of a pistol, revolver or assault weapon). Also exempted under these provisions are four of the eight States that have filed an amicus brief in support of the Petitioners--Colorado, Idaho, Nebraska, and Virginia. The other exempted States and territories are California, Connecticut, Delaware, Florida, Georgia, Guam, Hawaii, Illinois, Louisiana, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, New Jersey, New York, North Carolina, Oregon, Tennessee, Utah, Virgin Islands, Washington, and Wisconsin.

Court will construe to avoid such problems unless such construction is plainly contrary to the intent of Congress") (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed. 2d 645, 654 (1988)). Moreover, the criminal penalty provisions in the Brady Act, *see* 18 U.S.C. §924(a), do not apply to government officials.

II. THE BRADY ACT PROVISIONS ARE CONSISTENT WITH THE TRADITION AND ORIGINAL UNDERSTANDING OF STATE-FEDERAL COOPERATION IN LAW ENFORCEMENT

A. The First and Second Congresses Recognized the Validity of State Officers Assisting with Federal Duties

The challenged provisions of the Brady Act resemble legislation passed by the First and Second Congresses and fit comfortably within the design of federal-state relations contemplated by those bodies. The First Congress, the very body that framed the language of the constitutional proposal that was eventually ratified by the States as the Tenth Amendment,[2] had to establish the entire structure of the new federal government, including enforcement of federal law and the collection of duties, imposts, and customs revenues, a mammoth task that could hardly be accomplished at once. With respect to the collection of federal duties, in particular, an interesting succession of legislation ensued with direct parallels to the interim and permanent provisions of the Brady Act.

The First Congress provided almost immediately for the

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[2] The Tenth Amendment, as part of the original Bill of Rights, was proposed by the First Congress and was not ratified by the requisite number of States until December 15, 1791.

establishment and appointment of districts, ports, and officers to collect "the duties imposed by law on the tonnage of ships and vessels, and on goods, wares and merchandises imported into the United States." Act of July 31, 1789, ch. V, 1 Stat. 29 (1789). The law did not, however, initially preempt state authority and transfer it to federal officials; indeed, no initial provision was made at all for such federal officials in North Carolina and Rhode Island. *See id.* Instead, the Congress used certain state officials to undertake collection of other tonnage duties by enacting federal legislation that expressly declared congressional consent to the operation of such state procedures. *See* Act of August 11, 1790, ch. XLIII, 1 Stat. 184 (1790) (concerning Maryland, Georgia, and Rhode Island); *see also* Act of February 9, 1791, ch. V, 1 Stat. 190 (1791) (Baltimore, Maryland); Act of March 19, 1792, ch. X, 1 Stat. 243 (1792) (Baltimore, Maryland).[3] The Congress thus built upon Alexander Hamilton's observation in the *Federalist* that with respect to import duties, "the probability is that the United States will . . . make use of the State officers and State regulations for collecting the additional imposition." *The Federalist,* No. 36 at 221 (A. Hamilton) (C. Rossiter ed.).[4]

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[3] The resulting authority that was exercised by the wardens of the port of Baltimore, apparently under both Maryland law and federal law pursuant to these statutes, later gave rise to the famous test case in the United States Supreme Court on the important federalism issue of whether the Bill of Rights could be applied to state officials or only to federal officials, as the Court ultimately held. *See Barron v. Mayor & City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 8 L.Ed. 672 (1833).

[4] Similarly, James Madison opined in a later paper that the collection of revenues "under the immediate authority of the

Like the Brady Act itself, these statutes were enacted as interim measures for periods of one to three years. They thus stood as congressional mandates to state officials to exercise federal power, in preference to the only feasible alternative, which was full preemption of state authority and occupation of the entire field by the federal government. Significantly, they accomplished that object by operating directly through state officials.

The First Congress also enacted several measures that imposed direct obligations upon state officials, all of them directly analogous to the Brady Act in the sense that they were reasonable in scope and not unduly intrusive into state sovereign functions. For example, the statute that prescribed the form of the mandatory oath or affirmation to support the Constitution of the United States was made applicable not only to federal officials, but also to state legislators and to state executive and judicial officers. *See* Act of June 1, 1789, ch. I, §3, 1 Stat. 23 (1789). In addition, the original statute authorizing the prosecution and punishment of treason against the United States required cooperation by the governors and judges of the several States in gathering information about any such activities. *See* Act of April 15, 1790, ch. IX, §2, 1 Stat. 112 (1790).

The Second Congress also enacted legislation that imposed direct obligations upon state executive officials. The statute that established the mechanism for conducting Presidential elections, for example, imposed specific duties on "the executive authority" of the States. *See* Act of March 1, 1792, ch. VIII, §3, 1 Stat. 240 (1792). And even more far-reaching was the original Fugitive Slave Act,

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Union, will generally be made by the officers, and according to the rules, appointed by the several States." *The Federalist*, No. 45, at 292.

which imposed significant duties directly upon "the executive authority" of the States to cause certain persons "to be arrested and secured, and notice of the arrest to be given," and "to cause the fugitive to be delivered to such agent when he shall appear." Act of February 12, 1793, ch. VII, §1, 1 Stat. 302 (1793). *See also* Act of May 2, 1792, ch. XXVIII, 1 Stat. 264 (1792) (setting out President's authority over state militia and imposing corresponding duties on the officers thereof). Thus, the legitimacy of federal legislation requiring reasonable assistance from state executive officials was assumed by the legislators who established the original understanding of state-federal relations.

B. The Compiling, Storing, Checking, And Sharing Of Information For Criminal Law Enforcement Between The States And The Federal Government Is An Area Of Traditional Intergovernmental Cooperation.

The tradition of cooperative federalism in the law enforcement context has been particularly strong. *See Elkins v. United States*, 364 U.S. 206, 211, 80 S.Ct. 1437, 1440, 4 L.Ed. 2d 1669, 1674 (1960) (recognizing "the entirely commendable practice of state and federal agents . . . cooperat[ing] with each other in the investigation and detection of criminal activity."). Throughout our nation's history, federal officials and state and local law enforcement officers have teamed up to conduct investigations, gather facts, identify and pursue suspects, make arrests and charging decisions, and prepare prosecutions for crime. Such cooperation has become commonplace because of its obvious benefits. As Congress has concluded about two of the nation's most urgent crime problems, "cooperation among Federal, State and local law

enforcement agencies is critical to an effective national response to the problems of violent crime and drug trafficking in the United States." Pub. L. No. 101-647, §612(2), 104 Stat. 4823 (1990). In addition, further coordination occurs regularly on such matters as detainers, extraditions, sentencings, and confinement and handling of prisoners. In these and many other areas, the States and the federal government constantly share information and resources in pursuit of the common objective of enforcing federal and state criminal laws. Here and in other contexts, this Court's Tenth Amendment decisions have recognized the value and legitimacy of the state and federal governments combining their resources to work together through various forms of "cooperative federalism." *See, e.g., FERC*, 456 U.S. at 765-770, 102 S.Ct. 2126, 2140-2143, 72 L.Ed. 2d 532, 550-554; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289, 101 S.Ct. 2352, 2367, 69 L.Ed. 2d 1, 24 (1981).

Strong state-federal cooperation is absolutely essential to effective law enforcement. This cooperation was much in evidence in a number of recent highly publicized investigations, including the crash of TWA Flight 800 and the bombing at the Atlanta Olympics. State law enforcement officials expect and need the support and assistance of their federal counterparts and, indeed, state officials understand that in appropriate cases they must take direction from federal officials. The already considerable problems inherent in conducting successful criminal investigations in this vast country of 50 states would be multiplied by a constitutional rule which encourages states to withdraw from such cooperative efforts.

Moreover, the interaction between state and federal government in the law enforcement arena has substantially benefitted the states. As this Court has recognized, this

beneficial symbiotic relationship is relevant to the Tenth Amendment analysis; it should be recognized that the modern tools of criminal law enforcement have been significant in "allow[ing] the States . . . to enact and administer their own [laws,] structured to meet their own particular needs," while also permitting the federal government to do the same. *Hodel*, 452 U.S. at 289, 101 S.Ct. at 2367, 69 L.Ed. 2d at 24. The modest tasks that the Brady Act temporarily imposes on state officials should be judged together with the substantial benefits that the States receive under the Brady Act and through pervasive use of the NCIC.

III. THE BRADY ACT IS CONSISTENT WITH A ROBUST INTERPRETATION OF TENTH AMENDMENT PRINCIPLES

The amici States fully support the robust view of state sovereignty under the Tenth Amendment reflected in this Court's opinion in *New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992) and in Justice O'Connor's partial dissent in *FERC v. Mississippi*, 456 U.S. 742, 102 S.Ct. 2126, 72 L.Ed. 2d 532 (1982). Upholding the interim provisions of the Brady Act is perfectly consistent with a vigorous interpretation of the Tenth Amendment and respects state sovereignty in determining law enforcement priorities. As Justice Kennedy recently observed in a different but related context: "This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, *cf. New York v. United States*, 505 U.S. 144, 112 S.Ct. 2408, 120 L.Ed. 2d 120 (1992), or to organize its governmental functions in a certain way, *cf. FERC v. Mississippi*, 456 U.S. at 781 (O'Connor, J., concurring in judgment in part and dissenting in part)." *Lopez v. United States*, 115 S.Ct. 1624, 1642, 131

L.Ed. 2d 626 (1995) (Kennedy, J., concurring).

A. The Brady Act Is Significantly More Respectful of State Sovereignty than the Law Upheld by the Majority in *FERC v. Mississippi*

In *FERC*, this Court upheld against a Tenth Amendment challenge a federal regulatory scheme far more intrusive than the interim provisions of the Brady Act. There, this Court approved "Federal Government attempts to use state regulatory machinery to advance federal goals" of a national energy conservation policy. 456 U.S. at 759, 102 S.Ct. at 2137, 72 L.Ed. 2d at 546. The statute affirmed in FERC *mandated* that state public utility commissions hold public hearings, conducted in accordance with federally prescribed procedures and by specified deadlines, to review and consider the adoption a range of detailed federal regulatory standards, and then produce for public inspection a written statement of reasons if the federal standards were not adopted. *Id.* at 746-50, 102 S.Ct. at 2130-2132, 72 L.Ed. 2d at 538-541. The statute empowered "any person" to bring an action in state court to enforce the State's obligation to hold hearings and review the federal standards. *Id.* In addition, the statute imposed annual reporting requirements on state regulatory authorities to describe their consideration of the federal standards. *Id.*

Despite these extensive mandates to state regulatory authorities, Justice Blackmun's opinion for the *FERC* majority found the statute valid under the Tenth Amendment because it did not "'directly compel' the States to enact a legislative program," 456 U.S. at 765, 102 S.Ct. at 2141, 72 L.Ed. 2d at 550, or "'commandeer[] the legislative processes of the States,'" *id.* at 764-765, 102 S.Ct. at 2140, 72 L.Ed. 2d at 550 (quoting *Hodel*, 452 U.S.

at 288, 101 S.Ct. at 2366). The Court acknowledged that the statute imposed significant compliance requirements on the States, but noted that Congress had appropriated $40,000,000 for each of the first two fiscal years "to help state regulatory authorities defray the costs of complying with [the federal law]." *Id.* at 751 n.14, 102 S.Ct. at 2126. Nonetheless, this Court held that the fact that the statute imposed obligations on state executive officials did not render the statute *per se* unconstitutional, and it rejected the view that the Tenth Amendment categorically forbids Congress from enacting laws that require some degree of assistance from state executive officials. In so holding, the Court disavowed the "19th century view" reflected in a "rigid and isolated statement" from *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107, 16 L.Ed. 717, 729 (1861), that Congress "'has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it.'" *FERC*, 456 U.S. at 761, 102 S.Ct. at 2138; *see also id.* at 762-763, 102 S.Ct. at 2139 (citing *Testa v. Katt*, 330 U.S. 386, 393, 67 S.Ct. 810, 91 L.Ed. 967 (1947), which "reveals that the Federal Government has some power to enlist a branch of state government -- there the judiciary -- to further federal ends.").[5]

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[5] More recently, this Court has overruled *Dennison*, unequivocally rejecting its rigid notion of federal-state relations: "*Kentucky v. Dennison* is the product of another time. The conception of the relation between the States and the Federal Government there announced is fundamentally incompatible with more than a century of constitutional development. Yet this decision has stood while the world of which it was a part has passed away. We conclude that it may stand no longer." *Puerto Rico v. Branstad*, 483 U.S. 219, 230, 107 S.Ct. 2802, 2809, 97 L.Ed. 2d 187, 197 (1987). The inflexible "19th century view" reflected in *Dennison* is also incompatible with the much of the First and Second Congresses' legislation discussed earlier.

In fact, the Brady Act provisions at issue here pass constitutional muster even under the more exacting Tenth Amendment standard in Justice O'Connor's partial dissent in *FERC*. Under Justice O'Connor's approach in that opinion, a congressional enactment violates the Tenth Amendment if it regulates "'States as States,'" addresses "matters that are indisputably 'attribute[s] of State sovereignty'" and "directly impair[s] [the State's] ability to 'structure integral operations in areas of traditional governmental functions.'" 456 U.S. at 778, 102 S.Ct. at 2147 (quoting *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S. at 287-288, 101 S.Ct. 2352, 2365-2366, and *National League of Cities v. Usery*, 426 U.S. 833, 854, 845, 852, 96 S.Ct. 2465, 2475, 2471, 2474, 49 L.Ed. 2d at 245, 259, 253, 257)). Moreover, as Justice O'Connor recognized in her *FERC* partial dissent, there may be situations where a particular law transgresses the Tenth Amendment principles listed above, but is nonetheless valid because "the nature of the federal interest advanced may be such that it justifies the State's submission." 456 U.S. at 778, 102 S.Ct. at 2147, n.4, 72 L.Ed. 2d at 559 (quoting *Hodel*, 452 U.S. at 288 n.29, 101 S.Ct. at 2366 n.29).

Applying the analysis from Justice O'Connor's partial dissent in *FERC* to the Brady Act reveals that the Brady Act requirements are far more respectful of Tenth Amendment values than the scheme upheld by the majority in *FERC*. The statute in *FERC* regulated the "States as States" because, through federal law, Congress directed state agencies to undertake an extensive review of detailed standards. In contrast, the Brady Act primarily regulates private, individual conduct--handgun transfers--and requires only the incidental and temporary *assistance* of state officials. Moreover, whereas the laws at issue in *FERC*

usurped State decisionmaking and policymaking procedures by setting "agendas" for state agencies exercising delegated legislative power, *id.* at 780, 102 S.Ct. at 2147-2148, 72 L.Ed. 2d 532, the Brady Act merely requires ministerial assistance from law enforcement officers and does not dictate procedures or decisionmaking; in fact, quite to the contrary, the Brady Act leaves complete discretion to state officials to determine, based on circumstances unique to each CLEO, how the background checks are to be performed and what priority they should have among other state law enforcement activities. Finally, whereas Justice O'Connor found that the statute in *FERC* impaired States' ability to "structure integral operations in areas of traditional government functions," the Brady Act asks law enforcement officers to undertake an activity--ascertaining criminal history--that is already part of their normal duties, and affords those officers discretion to decide what is a "reasonable effort" under the circumstances.

Justice O'Connor also observed that there may exist situations where a particular law that violates these principles should be upheld because "the nature of the federal interest advanced may be such that it justifies the State's submission." 456 U.S. at 778 n.4, 102 S.Ct. at 2147 n.4, 72 L.Ed. 2d at 559 n.4 (quoting *Hodel*, 452 U.S. at 288 n.29, 101 S.Ct. at 2366 n.29). Although there is no need to reach this question here, because the Brady Act does not otherwise violate the Tenth Amendment, the nationwide epidemic of handgun violence clearly qualifies as a unique example of a problem compelling State cooperation in a nationwide solution. The goals of the Brady Act would be thwarted if felons could purchase handguns in some States without any background check. Hence, the nature of the federal interest in ensuring that there is nowhere in America that felons can legally purchase handguns on the spot

justifies requiring state cooperation with these interim measures. *Cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. ___, ___, 115 S.Ct. 1842, 1873, 131 L.Ed. 2d 881 (1995) (Kennedy, J., concurring) ("the political identity of the entire people of the Union is reinforced by the proposition . . . that, though limited as to its objects, the National Government is and must be controlled by the people without collateral interference by the States.")

B. The Brady Act Does Not Commandeer State Decisionmaking Authority

The Brady Act is also consonant with the strong Tenth Amendment values embodied in the majority opinion in *New York*. As noted in that case, the content of state sovereignty under the Tenth Amendment is not evident from the tautological language of that provision; rather, Tenth Amendment cases require the Court to interpret the intricate relationship between federal and state power wrought by the Framers of the Constitution. 112 S.Ct. at 2419. Applying the analysis and substantive Tenth Amendment standards found in *New York* to this case leads to the conclusion that the Brady Act should be upheld.

In *New York*, the Court considered a type of federal regulation qualitatively different from the Brady Act, one that invaded the province of State sovereignty in a way the Brady Act does not. Unlike the Brady Act, the statute in *New York* coerced States into enacting a regulatory scheme, raising the question whether "Congress may direct or otherwise motivate the States to regulate in a particular field or in a particular way." 505 U.S. at 161, 112 S.Ct. at 2420, 120 L.Ed. 2d at 140. The federal hazardous waste legislation provision found unconstitutional in *New York* put States in the untenable position of either regulating according to Congress's direction or taking title to--

accepting a "forced transfer" of--hazardous waste. Because Congress lacked the power to do either of these things independently, it could not require States to choose between the two alternatives: "A choice between two unconstitutionally coercive regulatory techniques is no choice at all." 505 U.S. at 176, 112 S.Ct. at 2428, 120 L. Ed. 2d at 150. Such a scheme effectively "'commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Id.* (quoting *Hodel*, 452 U.S. at 288, 101 S.Ct. at 2366). This Court properly held that no "constitutional provision authorizes Congress to command state legislatures to legislate," 505 U.S. at 179, 112 S.Ct. at 2430, 120 L.Ed. 2d at 152, as the statute at issue there did. The consequences of failing to take legislative action in New York were extreme: States would be required to "take title" to radioactive waste.

Hence, among its other defects, the statute in New York directly regulated "the States as States." *Cf. FERC*, 456 U.S. at 778, 102 S.Ct. at 2147 (O'Connor, J., concurring in part and dissenting in part). The Brady Act, by contrast, regulates private individual conduct, with the minimal, short-term assistance of state and local officials. This distinction, between the permissible regulation of individuals and the forbidden regulation of States, was the animating principle of *New York*: "In providing for a stronger central government, therefore, the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." 505 U.S. at 166, 112 S.Ct. at 2423, 120 L.Ed. 2d at 144; *see also* 505 U.S. at 164, 112 S.Ct. at 2422, 120 L.Ed. 2d at 143 ("In the end, the Convention opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States."). Significantly,

the First and Second Congress, which, as discussed earlier, imposed various duties on state executive officials, were obviously sensitive to avoiding measures that affected the exercise of state legislative authority. These Congresses did not enact statutes that imposed mandatory duties upon the state legislatures, but rather acted by means of "Resolutions" that made "Recommendations" to the state legislatures. *See, e.g.*, Resolution No. 2, September 23, 1789, 1 Stat. 264 (1789) (recommending "to the legislatures of the several States to pass laws, making it expressly the duty of the keepers of their gaols, to receive and safe keep therein all prisoners committed under the authority of the United States, until they shall be discharged by due course of the laws thereof").

The Brady Act respects this constitutional principle. Unlike the hazardous waste law in *New York*, the Brady Act does not "command state legislatures to legislate," *New York*, 505 U.S. at 179, 112 S.Ct. at 2430, 120 L.Ed. 2d at 152, or otherwise usurp the State's sovereign decisionmaking or policymaking authority. Instead, it merely requires state executive officials to make a reasonable effort, tailored to local circumstances, to carry out a ministerial act in furtherance of a goal of national importance--regulating handgun sales. The information to be considered, moreover, is available for the most part in the NCIC's computerized criminal history file, which state and local law enforcement officers use on a daily basis. In sum, because the Brady Act's requirements of state executive officials are reasonable in view of the corresponding benefits received, are minimally intrusive, and are imposed only on an interim basis, they pass muster under the Tenth Amendment.

CONCLUSION

For the foregoing reasons, as well as those stated in the Briefs for the United States and its other supporting amici, this Court should uphold the constitutionality of the Brady Act under the Tenth Amendment.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

ANDREW H. BAIDA
JOHN B. HOWARD, JR.
Assistant Attorneys General
200 St. Paul Place, 20th Floor
Baltimore, Maryland 21202
(410) 576-7055

Counsel for the Amici States

RICHARD ADAMS CORDRAY
4900 Grove City Road
Grove City, Ohio 43123

Of Counsel

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